**U.S. Department of Labor**

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0241 BLA

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| WILMA J. HOLMES<br>(Widow of JOHN K. HOLMES)<br><br>Claimant-Respondent<br><br>v.<br><br>ISLAND CREEK COAL COMPANY<br><br>Employer-Petitioner<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED: 03/23/2016<br><br>DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Kathleen H. Kim (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2013-BLA-05220) of Administrative Law Judge Linda S. Chapman, rendered on a survivor's claim filed July 26, 2011, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge found that the miner had at least twenty-two years of underground coal mine employment and suffered from a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2). Based on those findings, and the filing date of the claim, the administrative law judge determined that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge also found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in requiring employer to "rule out" the existence of pneumoconiosis, and did not properly weigh the medical opinions in considering whether employer established rebuttal of the Section 411(c)(4) presumption. Employer maintains that the administrative law judge's findings do not satisfy the Administrative Procedure Act (APA), 5 U.S.C. §500 *et seq.*, as incorporated into the Act by 30 U.S.C. §932(a).[3] Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director),

[1] Claimant is the surviving spouse of the miner, who died on May 4, 2011. Director's Exhibits 14, 17. Because the miner was not awarded benefits during his lifetime, claimant is not derivatively entitled to benefits under Section 422(*l*) of the Act, 30 U.S.C. 932(*l*) (2012).

[2] Under Section 411(c)(4), a miner's death is presumed to be due to pneumoconiosis if he or she had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and also suffered from a totally disabling respiratory or pulmonary impairment at the time of his or her death. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(b).

[3] The Administrative Procedure Act provides that every adjudicatory decision must include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

has filed a limited brief, urging the Board to reject employer's argument that the administrative law judge decided this claim based on the wrong legal standard.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to rebut the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis, employer must affirmatively establish that the miner did not have legal[6] and clinical[7] pneumoconiosis, or that "no part of the miner's death was caused by

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[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that the miner had at least twenty-two years of underground coal mine employment, that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2), and that claimant invoked the presumption at Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 16.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6.

[6] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The regulation also provides that "a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b) (emphasis added).

[7] Clinical pneumoconiosis is defined as:

> [T]hose diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 138-43 (4th Cir. 2015); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone Coal Mining Corp*., 25 BLR 1-149, 1-150 (2015) (Boggs, J., concurring and dissenting). In considering whether employer disproved the existence of legal pneumoconiosis, the administrative law judge weighed the medical opinions of Drs. Castle, Spagnolo, and Khoury. Decision and Order at 17-19. Each of these physicians opined that the miner suffered from bullous emphysema caused by smoking, which resulted in a totally disabling obstructive respiratory impairment. Employer's Exhibits 2, 4, 5. The administrative law judge found that "neither Dr. Castle nor Dr. Spagnolo adequately explained how they were able to rule out [the miner's] extensive history of coal mine dust exposure as a factor, even if not the primary factor, in his totally disabling respiratory impairment." Decision and Order at 19; *see* Employer's Exhibits 1-2, 5-7. Similarly, the administrative law judge found that Dr. Khoury failed to adequately explain why coal dust exposure did not contribute to the miner's disabling emphysema. Decision and Order at 17; *see* Employer's Exhibit 4.

Employer asserts that the administrative law judge did not properly analyze whether the medical opinions were sufficient to disprove the existence of legal pneumoconiosis, as defined at 20 C.F.R. §718.201. Employer argues that the administrative law judge erred by requiring its experts to "'rule out' or find that 'no part' of [the miner's] impairment was due to coal mine dust." Employer's Brief in Support of Petition for Review at 6, *citing* Decision and Order at 18. Employer states that "[t]he 'rule out' standard is applicable only to disability causation [in miner's claims], not the existence of pneumoconiosis." *Id*. at 7. Employer maintains that this case must be remanded for application of the correct rebuttal standard or, at the very least, for the administrative law judge to clarify what rebuttal standard she is applying.

We agree with employer that the administrative law judge did not clearly set forth the proper rebuttal standard, to the extent that her rebuttal analysis somewhat blends the standards applicable to legal pneumoconiosis and disability/death causation. *See* Decision and Order at 17-18. The administrative law judge's error, however, does not require remand. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). The administrative law judge considered the explanations given by Drs. Castle and Spagnolo for why *they* each excluded a diagnosis of legal pneumoconiosis, and she ultimately concluded that their opinions were not credible on the etiology of the miner's respiratory impairment. Thus, the administrative law judge determined that employer was unable to disprove the existence of legal pneumoconiosis and rebut the presumption of death

causation, based on the *credibility* of the evidence, and not her application of a particular rebuttal standard.[8] *See Minich*, 25 BLR at 1-156; Decision and Order at 16-18.

In reviewing the medical opinions, the administrative law judge noted correctly that Dr. Castle opined that the miner did not have legal pneumoconiosis, in part, because the miner's objective tests did not demonstrate any restrictive respiratory impairment, only an obstructive respiratory impairment. *See* Decision and Order at 17; Employer's Exhibit 2. The administrative law judge also observed correctly that "the Act recognizes that coal mine dust exposure can result in a purely obstructive impairment." Decision and Order at 17-18; *see* 20 C.F.R. §718.201(a)(2). The administrative law judge rationally found that, "even if Dr. Castle is correct, that coal worker's pneumoconiosis 'typically' results in a mixed, irreversible obstructive and restrictive ventilatory impairment, this does not mean that the miner could not be one of the 'atypical' persons whose exposure to coal mine dust resulted in a purely obstructive impairment." Decision and Order at 17; *quoting* Employer's Exhibit 2; *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324, 25 BLR 2-255, 2-265 (4th Cir. 2013); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

In addition, Dr. Castle excluded coal dust exposure as a factor in the miner's demonstrated hypoxemia and declining oxygen saturation on arterial blood gas testing, by relying on the fact that the miner exhibited a "decline in oxygen saturation" as he continued to smoke cigarettes. Employer's Exhibit 2. The administrative law judge permissibly found that Dr. Castle "did not explain why a decline in oxygen saturation in the face of continued smoking necessarily ruled out coal mine dust exposure as a factor." Decision and Order at 18; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. We therefore affirm the administrative law judge's finding that Dr. Castle's opinion is not persuasive to disprove the existence of legal

[8] We discern no error in the administrative law judge's finding that Dr. Khoury's opinion was insufficient to affirmatively establish that the miner did not suffer from legal pneumoconiosis. 20 C.F.R. §718.201(b); *W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015). The administrative law judge noted correctly that Dr. Khoury testified that the most common cause of the miner's emphysema is cigarette smoking, but that "it would be *hard to say that* [s*moking*] *was the only cause*." Employer's Exhibit 4 at 11 (emphasis added). Furthermore, although Dr. Khoury testified that smoking was the primary cause of the miner's obstructive impairment, he did not address whether the miner's obstructive impairment was significantly related to, or substantially aggravated by, dust exposure in coal mine employment. *See* 20 C.F.R. §718.201(b); Employer's Exhibit 4.

pneumoconiosis.[9] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

In evaluating the credibility of Dr. Spagnolo's opinion, that the miner did not have legal pneumoconiosis, the administrative law judge accurately described that he "relied on the 'marked improvement' shown between a 2005 and a 2006 pulmonary function study" to rule out coal dust exposure as a causative factor for the miner's disabling emphysema, "stating that airflow obstruction from coal workers' pneumoconiosis is fixed, and would not show variability[.]" Decision and Order at 18, *quoting* Employer's Exhibit 5. The administrative law judge permissibly rejected this explanation because "these studies were done more than five years before [the miner's] death" in 2011, and "in the absence of any studies done in that five year time period [leading up to the miner's death], there is no basis for any conclusion that [the miner's] airflow obstruction was 'variable.'" Decision and Order at 18; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Furthermore, the administrative law judge noted correctly that, in explaining why the miner did not have legal pneumoconiosis, Dr. Spagnolo emphasized that the pulmonary function studies, which show a respiratory impairment, were obtained more than ten years after the miner left the mines, which "suggests that he does not agree" that pneumoconiosis may be a latent disease which may first become detectable only after the cessation of coal mine dust exposure. Decision and Order at 18; *see* 20 C.F.R. §718.201(c); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313, 25 BLR 2-115, 2-130 (4th Cir. 2012). In addition, the administrative law judge reasonably found that Dr. Spagnolo "did not address the role of coal mine dust exposure in [the miner's] hypoxemia" on arterial blood gas testing. Decision and Order at 18 n. 17; *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 756, 21 BLR 2-587, 2-591 (4th Cir. 1999); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 174, 21 BLR 2-34, 2-48 (4th Cir 1977).

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions, based on the explanations given by the experts for their diagnoses, and assign those opinions appropriate weight. *See Hicks*, 138 F.3d at

[9] Employer argues that the administrative law judge improperly acted as a medical expert by requiring Dr. Castle to explain the cause of the administrative law judge's own diagnosis of a "second form of emphysema." Employer's Brief in Support of Petition for Review at 18-19. Because the administrative law judge provided a valid reason for giving less weight to Dr. Castle's opinion, we need not address employer's additional argument concerning the administrative law judge's weighing of this opinion. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-3 n.4 (1983).

533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988). Because the administrative law judge explained her credibility findings in accordance with the APA, and they are supported by substantial evidence, we affirm her determination that employer failed to establish that the miner did not have legal pneumoconiosis and is unable to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(2)(i).[10] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

With respect to the issue of death causation, the administrative law judge found that "Dr. Castle did not provide any explanation or support for his statement that he could 'absolutely' rule out coal mine dust exposure as a causative or contributing factor in [the miner's] death, which he felt was due to [the miner's] severe bullous emphysema, in turn due to [the miner's] smoking history." Decision and Order at 19, *quoting* Employer's Exhibit 7 at 29. The administrative law judge further found that Dr. Spagnolo's "conclusory and unsupported statements are not sufficient to meet [employer's] burden to establish that [the miner's] history of coal mine dust exposure was not a factor in his respiratory death." Decision and Order at 19. Based on the administrative law judge's permissible determinations that the opinions of Drs. Castle and Spagnolo are not adequately reasoned, and because neither physician diagnosed legal pneumoconiosis, we affirm the administrative law judge's finding that the opinions of Drs. Castle and Spagnolo are insufficient to establish that no part of the miner's death was caused by legal pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(2)(ii). *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. 2015); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 23 BLR 2-372, 2-384 (4th Cir. 2002); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995). We therefore affirm the administrative law judge's finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); *see Bender*, 782 F.3d at 137.

[10] The administrative law judge found that the x-ray evidence was in equipoise and that the CT scan evidence was negative for clinical pneumoconiosis. Decision and Order at 16-17. She concluded that employer did not satisfy its burden to disprove the existence of clinical pneumoconiosis. *Id*. at 17. Employer challenges the administrative law judge's finding that it failed to disprove the existence of clinical pneumoconiosis. Employer's Brief at 9-16. However, it is not necessary that we address employer's arguments regarding clinical pneumoconiosis, as employer's failure to disprove the existence of legal pneumoconiosis precludes rebuttal under 20 C.F.R. §718.305(d)(2)(i). *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge